intervener to the respondent and direct the deposit lodged in court by way of security to be paid out to the respondent to account of his taxed costs.

Solicitors: *Adnan Sundra & Low; Fernandez & Co.; Chooi & Co.*

Appeal dismissed.

MALAYSIA NATIONAL INSURANCE SDN. BHD. v. MALAYSIA RUBBER DEVELOPMENT CORPORATION

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) November 1 & 13, 1984 & January 18, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 137 of 1984]

Insurance – Construction of insurance policy – Goods in transit insurance policy – Goods on way to Port Klang temporarily housed at godown awaiting shipment – Goods destroyed by fire at godown – Whether goods destroyed in course of transit – Exceptions set out in policy – Burden of proof – Contra proferentem rule.

Interpretation – "Transit" – Meaning of.

Evidence – Hearsay – No objection taken to – Does not make it admissible.

In this case the respondent had taken out a policy of insurance to cover processed rubber goods in transit. The goods were exported through Port Klang. On the way to Port Klang for shipment the goods were temporarily housed at the respondent's godown in Sungei Way. A fire broke out at the godown and the goods were destroyed. The respondent claimed indemnity for the loss of the goods from the appellant under the policy of insurance. The appellant denied liability contending that the goods were being housed in the godown for the purpose of storage, making up, packing or processing. Under the policy the appellant was only liable if the goods were lost, damaged or destroyed by fire while temporarily housed in the ordinary course of transit other than for the purpose of storage, making up, packing or processing. The learned trial Judge gave judgment for the respondent holding that the rubber was kept in the godown in the course of transit to Port Klang. He also held that the burden of proof was on the appellant to bring the case within any of the exceptions of the policy.

Held, dismissing the appeal: the learned Judge was correct in holding that the rubber was kept in the godown in the course of transit to Port Klang. He had examined the relevant provisions of the policy and studied the facts very carefully. He also had the advantage of listening to the witnesses and assessing their credibilities.

Cases referred to:

(1) *Sadler Brothers Company* v. *Meredith* [1963] 2 Ll.L.R. 293, 307.
(2) *Pennsylvania Company for Insurances on Lives and Granting Annuities* v. *Mumford* [1920] 2 K.B. 537.
(3) *S.C.A. (Freight) Ltd.* v. *Gibson* [1974] 2 Ll. L.R. 533.
(4) *Metal Scrap & By Products Ltd* v. *Federated Conveyors Ltd and Tribble (Third Party)* [1953] 1 Ll. L.R. 221, 227.
(5) *Bond Air Services Ltd.* v. *Hill* [1955] 2 Q.B. 417, 428.
(6) *Stiles* v. *The Cardiff Steam Navigation Co.* 33 L.J. Q.B. 310.

SUPREME COURT.

Raja Abdul Aziz Addruse (*Z. Zacharia* with him) for the appellant.

C. Abraham (*S. Radhakrishnan* with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal against the decision of the learned Judge is concerned with the construction of an insurance policy based on the particular facts of the case. The appellant/defendant is an insurance company. The respondent/plaintiff is a corporation (known as MARDEC) incorporated under the Malayan Rubber Fund (Research and Development) Ordinance, 1958. The respondent had thirteen rubber factories throughout Peninsular Malaysia. The processed rubber goods, mainly in the form of SMR, were exported through Port Klang. The goods on the way to Port Klang for shipment were temporarily housed at the respondent's godown at Sungei Way. The goods arrived in a one-ton pallet. At the godown the goods did not undergo any further process as they were already packed for export. The goods were kept at the godown awaiting the vessels to call at Port Klang. The normal waiting period could be two or three days but at times due to congestion at the port the waiting period would be longer – as long as three months.

The respondent took out a policy of insurance with the appellant to cover the goods while in transit. For this purpose the appellant issued the respondent with Goods in Transit Insurance Policy No. G.T./0010 covering the period from October 1, 1975 to September 30, 1976. While the policy was in force, on October 4, 1975 a fire broke out at the godown at Sungei Way destroying the goods kept there. The respondent

claimed indemnity for the loss of the goods amounting to $1,952,864.54 from the appellant under the policy. The appellant denied liability contending that the goods destroyed by the fire were being housed in the godown for the purpose of storage, making up, packing or processing. Under the policy, the appellant was only liable if the goods were lost, damaged or destroyed by fire while temporarily housed in the ordinary course of transit otherwise than for the purpose of storage, making up, packing or processing. The learned Judge gave judgment for the respondent for the sum claimed with interest at 12% per annum and costs. The appellant appealed.

There are six grounds of appeal. The last ground relates to interest. As the parties had agreed on the question of interest this ground was not proceeded with. The first two grounds are concerned with the question whether the rubber and the latex destroyed in the fire were in the ordinary course of transit "within the meaning of the policy of insurance." The policy sets out very clearly that the appellant agrees to indemnify the respondent in respect of loss, destruction or damage to the property by fire or accidental means, whilst "in or on or being loaded on or unloaded from any road vehicle or passenger or goods trains or whilst temporarily housed in the ordinary course of transit whether on or off the paid conveyances within the territorial limits" but not exceeding a specific limit of liability. The property insured and the type of journey intended to be covered by the term "transit" are described under the Schedule attaching to the policy as follows:–

"On processed SMR rubber packed in 1 metric ton ISO pallets and concentrated latex whilst in transit by road and/or rail from Insured's various factories in West Malaysia to Port Klang .....".

To succeed in the claim the respondent must prove that goods were in transit from its various factories to Port Klang and that the goods were destroyed by fire while being "temporarily housed in the ordinary course of transit" in the godown at Sungei Way. To avoid liability the appellant must bring its case within any of the ten Exceptions set out. In this case the appellant is relying on Exception No. 6 which states that the appellant is not liable in respect of:–

"loss destruction or damage whilst the property is temporarily housed in the course of transit for the purpose of storage making up packing or processing."

The appellant claimed the goods were sent to the godown to be made up. Hence the goods sent in and out did not balance. It was also contended that there was no evidence to show that the goods were conveyed directly from the factories to Port Klang. The respondent must prove that the goods went from the factories to Port Klang and not from the factories to the godown and then from the godown to Port Klang. It was submitted that P.W.1 and P.W.2 merely gave evidence to show that the goods were meant for the godown when the goods left the factories. In which case the goods were not in transit as contemplated by the policy, that is, a journey from the factories to Port Klang. The appellant is not disputing that the goods eventually went to Port Klang but says that the goods went to the godown from the factories and not Port Klang. The submission is that the learned Judge has addressed himself to the wrong question and therefore misdirected himself as to the issue involved. Also, as the delivery orders or consignment notes were not produced the learned Judge should have drawn an adverse inference. The respondent must prove that the goods went to Port Klang and not to the godown. As to the policy the appellant said the learned Judge misconstrued Exception No. 6. What was intended was not what the learned Judge had in mind. The word "ordinary" was not in the Exception but added to "course of transit" in construing the policy. This could have led the learned Judge to make the error.

The interpretation of the relevant provisions of the policy would depend on the facts of the particular case. What is "transit" is essentially a question of fact. This is the view expressed by Roskill J. in *Sadler Brothers Company* v. *Meredith*[1] in a passage which reads:

"... 'transit' means the passage of carriage of goods from one place to another, and I think the goods were still being carried, and therefore were still in transit from the one place to the other even though the lorry in which they were being carried was temporarily parked. Obviously, an exhaustive definition of transit is impossible, and equally obviously it is undesirable, and certainly I do not propose to attempt one. I am merely concerned with applying the facts of this case as I find them to be to this particular policy."

In the same way, the learned Judge, in the case under appeal, was concerned with applying the facts of the case to the policy. He had examined the relevant provisions of the policy and studied the facts very carefully. He also had the advantage of listening to the witnesses and assessing their credibilities. He came to the conclusion that:–

"... From the evidence adduced, I am satisfied that the rubber was kept in the godown in the course of transit to Port Klang."

A number of authorities was cited by the appellant and the learned Judge was urged to give a restrictive meaning to the definition of "transit". In *Pennsylvania Company For Insurances On Lives And Granting Annuities* v. *Mumford*[2] a bank took out a policy which insured the bank against loss of securities in its possession. The securities were stolen by one of its servants whilst the securities in question were being conveyed from the pallet room to the reception room. The policy covered loss between any houses or places situated within 100 miles from Philadephia where their business premises were situated. It was held that a transit between the vault and the customers' reception room was not a transit between any houses or places within the meaning of the relevant clause within the policy. Similarly, in *S.C.A. (Freight) Ltd.* v. *Gibson*[3] the goods were loaded in the consignor's premises near Rome for transportation to Manchester. The drivers decided to have a meal and they drove the fully-loaded lorry to a nearby restaurant. Instead of returning to the consignor's premises they decided to go for a trip in the vehicle to the centre of Rome. On the way to Rome the vehicle overturned and the goods were damaged. The court held that the journey to Rome was a joy ride (frolic of their own) on an expedition wholly unconnected with the furtherance of their carriage. The goods ceased to be in transit when they embarked on a journey which is not in a reasonable furtherance of their carriage to their ultimate destination.

The facts of these two cases are entirely different from the case under appeal and are easily distinguishable. In construing the provisions of the policy the court has to look at the facts of the particular case. A passage in *MacGillivray & Parkington* on Insurance Law, Seventh Edition, paragraph 1953, page 816 reads:—

"The moment when transit ends has never been authoritatively determined. Sometimes the policy will itself give some guidance ...".

Reference was made to the Schedule attached to the policy (see page 95 of the Appeal Record). The submission is that the Schedule provides sufficient guidance on the scope of the transit in this case. By virtue of the Schedule transit does not end at the godown at Sungei Way but only when the goods arrive at Port Klang.

Ground 3 is concerned with the nature of evidence and burden of proof. The learned Judge had seen and heard the witness and examined the documentary evidence. There was a complaint that certain consignment notes to overseas consignees were not produced. These original notes were destroyed by the fire. Nothing was asked about the availability of the duplicate copies of the notes. The learned Judge was satisfied that the respondent had proved its case. On the other hand, he found that the appellant had failed to prove the exception, that is, that the rubber was housed in the godown for the purposes of storage, making up, packing or processing.

Ground 4 attacks the learned Judge in his construction of the provisions of Exception 6 of the policy. The learned Judge held that the provisions were ambiguous in their meaning and purport, particularly the words "housed" and making up". He therefore invoked the *contra proferentem* rules in construing the policy. In support he cited a passage from the judgment of Croom-Johnson J. in *Metal Scrap & By Products Limited* v. *Federated Conveyors Limited and Tribble (Third Party)*[4] which reads:—

"... there is one perfectly good rule of construction which has bound underwriters for very many years, and that is that if they choose the language, if it is their language, then the document must be construed *contra proferentem*, which means to say against the person who put the language into the document upon which he is relying or upon which anybody relies."

We do not think the learned Judge was wrong to say that the burden of proving the exception was on the appellant who was relying on the exception to escape liability. The learned Judge used the two-pronged approach. First, he said that certain provisions of the policy were ambiguous, therefore, the *contra proferentem* rule must be invoked in construing the policy. Secondly, if he was wrong, that is, if there is no ambiguity in the language of the policy, the appellant was still liable to indemnify the respondent. The reason is that the appellant relies on the assertion that the respondent has contravened Exception 6 of the policy. The burden of proof was on the appellant. The law has been stated quite clearly by Lord Goddard C.J. in *Bond Air Services Limited* v. *Hill*[5] as follows:—

"But I cannot find that these cases have ever been regarded either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to

prove an exception, so it is for him to prove the breach of a condition of which would relieve him from liability in respect of a particular loss."

On the evidence, the learned Judge held that the appellant had failed to discharge that burden. We see no reason to differ from his view.

Ground 5 is concerned mainly with hearsay evidence. The appellant submitted that the learned Judge's view that the evidence of D.W.1 was hearsay was clearly erroneous. What P.W.1 and P.W.2 said to D.W.1 could not be hearsay. To support this proposition *Woodroffe and Ameer Ali*, 13th Edition, page 1490, *Sarkar's* Laws of Evidence, 11th Edition, page 179 and *Stiles* v. *The Cardiff Steam Navigation Co.*[6] were cited. In our view the material part of the evidence of D.W.1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objection should have been taken to the evidence of D.W.1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.

The authorities are clear on this. Perhaps, it is only necessary to cite *Sarkar*, Laws of Evidence, 13th Edition, page 51 which reads:—

"An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties..."

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Zainur & Maydien; Shearn Delamore & Co.*

R. SARASWATHY v. R. PALAKRISNAN

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Syed Agil Barakbah S.C. JJ.) December 16, 1985 & January 18, 1986]

[Kuala Lumpur — Supreme Court Civil Appeal No. 68 of 1985]

Family Law — Application for custody and for maintenance of child — Application made under Law Reform (Marriage and Divorce) Act, 1976 — No pending action for divorce — Parties living separately — Whether application properly made — Guardianship of Infants Act, 1961 — Married Women and Children (Maintenance) Act, 1950 — Law Reform (Marriage and Divorce) Act, 1976, ss. 83(3) & 93(1).

Interpretation of Statutes — Long title.

This was an appeal from the decision of the High Court reported at [1985] 2 M.L.J. 458. The appellant had claimed custody of her infant son under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 as well as maintenance for him under section 93(1) of the Act from the respondent, her husband. The parties had separated and the appellant and her son were living separately from the respondent in her parents' home. There was no pending action for divorce between the parties. The learned judge held that as there was no pending action for divorce neither section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 nor section 93(1) of the Act can be invoked. It was held that both on procedure and on the merits the application should be dismissed. The appellant appealed.

Held: (1) the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961 and the Married Women and Children (Maintenance) Act 1950) are all applicable depending on the circumstances of a particular case and in the state of affairs surrounding this appeal the application under section 88(3) of the Law Reform (Marriage and Divorce) Act, 1976 was properly made. There would be no need for the parties to wait, until perhaps the unlikely event of their commencing a divorce action before making such application;

(2) the appellant may therefore if she so desires proceed with the Originating Summons before another Judge of the High Court.

SUPREME COURT.

P.S. Ranjan (*Miss Bella Loo* with him) for the appellant.

G. Davidson for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The appellant/plaintiff sought the custody of her infant son as well as for maintenance from her husband, the respondent. The parties were married on November 30, 1974 at the Registry of Marriages, Kuala Lumpur and later underwent a Hindu marriage ceremony on September 6, 1975. Their only issue, the infant son and the subject matter of this appeal was born on February 6, 1979, which makes him just short of 7 years at the time of the hearing of this appeal. In December 1980 the appellant was forced to take him away from the matrimonial home to her parents' home following matrimonial problems she had with her husband. However in an effort to save her marriage she moved back to her matrimonial home together